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LIABILITY AND IMMUNITY IN INTERNATIONAL BUSINESS LAW*

INTRODUCTION

International business law has always been a diverse area of the law merging various legal sources and doctrines, operating in a business environment that is in constant motion. While the sources of international business law may seem to be scattered and fragmented lacking a unified core of law, this uncertainty could rightly serve the needs of business players in the international market providing them the probably most important doctrine this sector desires: freedom of contract. In this respect, freedom of contract in international business law always focused on the freedom to establish the content of the agreement, therefore, the lack of imperative rules provided a great deal of freedom to businesses allowing them to become almost totally independent from the shackles of national laws.¹

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1 Lorenzo, Sixto Sanchez: Choice of Law and Overriding Mandatory Rules in International Contracts After Rome I, Yearbook of Private International Law, 12 (2010) 68.

While national laws still facilitate businesses operating internationally with predictable and well established rules, the contracting parties may set up a unique system for their special relationships leaving almost no grounds and gaps to fill for the rules of national law. The various dispute settlement options – especially out of court dispute settlement schemes – may also grant the possibility to settle a dispute without the involvement of professional judges and the application of virtually anything other than their agreement. Unification, therefore, is undeniably difficult in any areas of contract law when codification targets international transactions. It may not seem to be a reality any time soon, however, businesses tend to be very different in size and needs, and many – mostly the small and medium size enterprises – still wish to get helping hands and model agreements to lower their legal costs and administrative burdens. UNCITRAL may facilitate them with model agreements² designed to serve as beacons for typical business transactions in the international market, boilerplate clauses mainly arise from national laws, and are so attached to the domestic concept of contract law thereof.

Choice of law clauses in the agreements are often directed by how a legal system regulates the most important questions of breach and the available civil remedies for the non-breaching party. Some systems are more attractive to international businesses than others, so it seems to be a natural desire in some legal systems to still vindicate universal application to core rules in their contract laws even if the parties wish to step out from the domestic arena. Another interesting phenomenon is how the enforcement of damages awards of injunctions gets extremely problematic with the involvement of state bodies, public agencies, and even of state owned companies. To escape the jurisdiction of a foreign forum or a foreign legal system, states and their related organs may be willing to go very far to defend their interests and channel the dispute and its resolution into the law enforcement – mostly litigation – system they established and operate. This phenomenon simplifies the question for businesses trading internationally to one problem: what would be the optimal scheme to regulate liability and immunity in international business law.

The research analyzed national contract laws and some internationally agreed standards to find the most desirable regimes for setting up a balanced and somewhat independent system of liability and immunity, and this study aims to share the most important findings of the research. At the end of the day, dimensions of liability and the evergreen debate of state immunity get to the same problem: how to provide a

2 An example to model agreements is the United Nations Commission on International Trade Law (UNCITRAL): Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, New York, United Nations (1988).

scheme in national laws that attract businesses and lure them in the territory of a given country. While the obvious answer would be that flexible and under-regulated systems may win the prize in the race, the race to the bottom concept has long been surpassed by the needs for certainty and predictability in the 21st century.

1. MODELS FOR ASSESSING LIABILITY FOR BREACH OF A CONTRACT

Contracts are natural engines of trading internationally and provide the backbone to relationships between businesses that wish to step out of their domestic safety. Still, the lack of a universal set of rules for breach and the available remedies is a long-accepted anomaly of international business law, and even regional unifications tend to remain ineffective in this regard.³ Sectoral regimes of liability, however, exist for certain types of contracts even in a universal level. The most obvious example is the United Nations Convention on the International Sale of Goods (hereinafter: CISG) that 85 state parties ratified, and they are from various parts of the globe. Sales contracts are certainly vital and classic transactions in the international market, however, they seem to be the only transactions enjoying some unification in terms of basic doctrines and rules for breach, liability and remedies.

Other types of agreements (most importantly distribution, franchising and licensing) often cry for some unification and find resolution and subsidiary rules in national legal systems forcing the contracting parties to choose an applicable law of the many domestic systems available to govern their transaction. That is why the dominance of national laws is so obvious in this regard, and the questions of liability are still determined by national contract laws. It makes parties find a system that they can mutually agree on, and one that provides an almost gapless regime for the most classic cases of breach and that defines the available remedies. Parties to an international business transaction rarely rely on the rules of private international law – conflict of laws – to find the governing law for their transaction, as it often is unpredictable and exposes them to laws they would otherwise never agree to apply.⁴ And, we should not forget about the concept of ‘auxiliary law’ in private international law that allows the forum – most commonly the court – to apply the laws of the forum in an actual debate in case they find anomalies in the governing law the parties mutually agreed on earlier.

3 De Ly, Filip: *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*. In: Appelbaum, Richard–Felstiner, William–Gessner, Volkmar: *Rules and Networks – The Legal Culture of Global Business Transactions*, Oxford, Hart Publishing (2001) 163.

4 Torga, Maarja: *Party Autonomy in Private International Law as a Tool for Converging National Laws*, Vilnius, Vilnius University Publishing (2010) 356.

While the CISG applies exclusively to sales transactions, it seems that recent reforms in national contract laws made the breach and remedy chapter of the Convention so popular among businesses that the way the CISG regulates damages and force majeure are often implemented in the agreement of the parties in the international arena.⁵ The CISG established strict liability for covering the loss the non-breaching might have suffered as consequence of the breach. Strict liability seems to be a fair ground for the allocation of risks as businesses rarely feel the breaching party exempted from liability in cases fault could not be proved on their sides. Strict liability technically admits the acknowledgement of risks at the time the parties conclude the contract, as it allows both parties to the agreement to calculate a fair consideration based on the risks they take. As risks are very diverse and may depend on the nature of the business a party conducts, the political stability in the country of business, the climate, the infrastructure, the rules of labor law, public administration, environmental protection regulations, and the involvement of public agencies to oversee the operation of businesses, only the contracting party itself is able to name the price of these risks when it gets engaged in an enforceable agreement.⁶ Therefore, the only defense could be force majeure, an impediment that is beyond the party's control, and was unforeseeable at the time the contract was made, and the breaching party could not overcome this impediment. The three-prong defense test suggests that exoneration of liability for breach is extremely difficult under the scope of the CISG. Courts and arbitration bodies dressed up the concept of force majeure with thick armor, granting exoneration to the breaching party only under extreme circumstances (e.g. embargos, revolutions, coups, wars, unexpected political decisions, export restrictions, natural disasters and workers strikes).⁷ While these decisions interpreted the CISG and sales contracts, we conclude that parties volunteer to include the same regime in other types of business transactions as well.

Their motivations seem obvious: the CISG claims international application preempting national contract laws completely, therefore, the application of the rules of the Convention always happened in consideration of the needs of international business. These specialties of the CISG's liability regime attract business to copy the text of the Convention into their agreement even if the contract is not a sales

5 Sonja A. Kruisinga: The Impact of Uniform Law on National Laws: Limits and Possibilities, *Electronic Journal of Comparative Law*, 13 (2009) 2, 20.

6 Zaheeruddin, Mohammed: Claim for Damages and their Requirements under the United Nations Convention on Contracts for International Sale of Goods, *International Journal of Liberal Arts and Social Science*, 4 (2016) 1, 49

7 Zarehshahi, Ali: A Comparative Study of Damages and Price Reduction Remedy for Breach of Sale Contract under CISG, *Journal of Politics and Law*, 4 (2016) 10, 131.

contract. Also, the rules on calculating damages in the CISG provide fair and predictable alternatives to the extremely chaotic solutions experienced in national contract laws. While the rules in national laws range from restricted compensation to full compensation, providing schemes for calculation or leaving the counting part to the forum, the CISG practically urges the non-breaching party to mitigate its loss through a reasonable and good-faith substitute transaction.

The difference in price between the breached contract and the substitute transaction will be the amount of damages. While parties to non-sales transactions cannot directly point to the application of the CISG, and they cannot rely on the Convention as a set of subsidiary rules for their transactions, the actual agreement may derogate the liability rules and the schemes on the calculation of damages in national contract laws in most countries. The undeniable advantage of the CISG's solution is that it enjoys firm interpretation and case-law developed due to the high number of cases and court and arbitration decisions available to the public, even in the national language in most cases.⁸

Another very popular solution to resolve the questions of liability for breach is the USA's Uniform Commercial Code's (hereinafter: UCC) model. The UCC imposes objective liability for the unlikely event of breach, and states that breach is a situation in which any reasonable business would consider performance impossible.⁹ This objective approach to the definition of breach refers to the common law concept on interpreting contracts, in general. As opposed to civil law legal systems, common law systems do not put an emphasis on the speaker's intent, instead, they scrutinize interpretation based on a reasonable bystander as of the same kind.¹⁰

Common law legal systems tend to be very strict in terms of remedies available for breach, and they rarely allow courts to cure the breach by imposing special performance obligations to the breaching party.¹¹ The more classic remedy is to award damages to the non-breaching party. The common law mind believes in freedom of contract to the extreme, therefore, contract theories in the UCC also promote the parties intent instead of providing an option to the courts to intervene

8 A good example is UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, Vienna, UNCITRAL (2012).

9 Eisenberg, Miller: *Damages versus Specific Performance: Lessons from Commercial Contracts*, New York University Law and Economics Working Papers (2013) 334.

10 Rowley, Keith A.: *Contract Construction and Interpretation: From the „Four Corners“ to Parol Evidence (and Everything in Between)*, UNLV Scholarly Works (1999) 554.

11 Zareshahi: op. cit. 135.

in the autonomous relationship of the parties. Damages are only allowed, according to the UCC, if there was a breach and the non-breaching party does not claim performance. Defenses against the damages claim are very interestingly regulated by the UCC. The breaching party may not be held liable for recovering the loss its actions caused to the other contracting party if the impediment leading to the breach was unforeseeable at the time of the conclusion of the contract, and the risk that served as an impediment was not allocated to either party.¹² Compared to the CISG solution, it is a different limitation on the concept of force majeure as the UCC relies more on the parties' original intents manifested in the contract, instead of some independent evaluation of the impediment. Risk allocation is, therefore, heavily promoted in the UCC urging parties to share the risks they face in the course of performance, and allocate them to either one of them taking full responsibility for these risks. Risk allocation is, in fact, a very friendly way of settling damages and liability in business relations. As in case of risk allocation, we may not even talk about liability in case the risk becomes real, as, originally in the contract, one of the parties agreed to take responsibility for the risk. Instead of liability for breach, it is more like an obligation the party volunteered to take.

It is hard not to deduct a conclusion from the UCC's proposed model for 'liability'. The UCC finds it more important to let the parties decide how to handle liability for breach and it lets them continue their business relations with a better impression, not feeling they even had a dispute. In fact, it is similar to the Japanese '*wa*' concept that reflects to the Japanese contracting style by placing an emphasis on developing a trusting long term relationship. In Japan, there is an aversion to litigation, therefore, the law and contract law philosophy put an emphasis on contracting parties working out their differences among themselves instead of turning to a dispute settlement body. Decisions, in such cases, are almost always based on '*ring-sho*' consensus.¹³ This is exactly why the UCC seems to be very popular among businesses trading internationally, and drive non-U.S. business to the conclusion that a pre-set allocation of risks in the contract may lead to faster, cheaper and less painful settlement of any arguments they may develop in the contract performance stage.

Defenses to a breach can only be impediments that are not typical for the regular course of the parties' businesses, and, since they were not foreseeable at contracting, parties did not allocate them to either of them. In such cases, the court' or the dispute

12 Article 2-715 of the Uniform Commercial Code (1990).

13 Wagatsuma, Hiroshi-Rosett, Arthur: Cultural Attitudes Towards Contract Law: Japan and the United States Compared, *Pacific Basin Law Journal*, 2 (1983) 1-2, 78.

resolution forum's interpretation is somewhat limited. They can only evaluate whether the impediment was foreseeable or not, whether it belonged to the regular course of the breaching party's business or not. This evaluation is much simpler than the three-prong test that adds two other factors (out of control, overcoming the impediment) to the equation. The UCC, on the other hand, takes mitigation very serious, and allows a proportionate deduction from the amount of damages in case the non-breaching party fails to mitigate the loss. Substitute transactions, however, are just one forms of mitigation but not particularly promoted by the UCC.

2. LIMITATIONS ON THE SCOPE OF DAMAGES

Once the core questions of breach and liability are decided, calculating damages gets to the center of the procedure. Full compensation rarely serves the goals of businesses operating and trading internationally, therefore, contracting parties often define special categories of damages limiting their liabilities for certain types instead of all. Civil law legal systems typically take a position on the composition of damages following a three-tier approach: direct damages (*damnum emergens*), loss of earnings (*lucrum cessans*), and expenses necessary to mitigate the loss. Civil law legal systems do not differentiate among the base of damages, they distinguish on their composition in nature.

Common law legal systems, on the other hand, usually list multiple types of damages disregarding the inner composition of them.¹⁴ Expectation damages cover the benefit of the bargain imposing an obligation to the breaching party to put the other party in a situation as if the contract had been properly performed. In practice, expectation damages are very classic forms of the reimbursement obligation parties include in the contract.¹⁵ Reliance damages aim to reimburse the costs of the non-breaching party's efforts he invested in the future performance of his end of the bargain given that the other party also performs his obligations.¹⁶ Reliance damages may be excessive in certain cases, therefore, it is a common trend in international business contracting that parties either exclude the reimbursement of reliance damages completely in their relations, or they impose caps on the amount of reliance damages.

14 Pearce, David-Halson, Roger: Damages for Breach of Contract: Compensation, Restitution, and Vindication, *Oxford Journal of Legal Studies*, 28 (2008) 1, 85

15 Brooks, Richard R.W.-Stremnitzer, Alexander: Remedies On and Off Contract, *The Yale Law Journal*, 120 (2011) 4, 720.

16 Brooks, Stremnitzer: op. cit. 725.

Consequential damages provoke the most debates in courts and arbitration committees, as they aim to recover indirect loss that occurred in 'reasonable' connection to the breach.¹⁷ Consequential damages are typically limited by the law in many legal systems, however, the doctrines of causes a system applies for the restriction heavily vary. They range from the but-for test through proximity to foreseeability. As the general concept on business transactions in international business law relies on full disclosure, the law typically promotes parties to disclose all potential motivations they have under the contract: practically, the law urges them to share what losses they face in case the other party breaches various duties undertaken in the contract. This approach is similar to the UCC's risk allocation solution for finding who is 'liable' for the breach, however, a certain trust is expected from the parties when it comes to full disclosure. Disclosure, however, triggers confidentiality questions and the fear of exposing trade secrets to a rival or to the general public, while it may be the only resort to prove that consequential loss was well known to the breaching party, therefore, he cannot escape the liability to reimburse them.

An existing practical difficulty in the world of international business contracts is the very different approach common law and civil law legal systems take in the debate over contract penalties. While civil law legal systems promote the agreement on penalties to secure certain duties of the parties, common law legal system find penalties violating public order, and order them unenforceable for the courts. Instead, common law legal systems require a reasonable estimation of potential losses the non-breaching party may suffer if the other party breaches a duty (liquidated or stipulated damages).¹⁸ There is a very thin line between the civil law concept on penalties and the common law approach to liquidated damages. When the applicable law is of a common law system's or the forum resides in a common law country, it is vital to have a clause in the contract that leaves no ambiguity that it was never meant to serve as contract penalty.

The only way contracting parties may avoid finding the clause unenforceable in the common law world is if they agree on dual-use clauses in the contract. Even if they intend to state penalties to secure some duties, they better off providing grounds of calculation and some explanation on why they got to the conclusion that the sum may cover the reasonable loss of the non-breaching party. If it is clear that the sum

17 Brooks, Stremnitzer: op. cit. 719.

18 Benjamin, Peter: Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law, *The International and Comparative Law Quarterly*, 9 (1960) 4, 613.

was based on a reasonable estimation and the nature and type of the loss are logical and are likely that the non-breaching party may suffer them, common law courts are willing to enforce these pre-set awards. In the civil law legal systems, the rules of calculation and the motivation that parties wanted to provide an estimation to the penalty are irrelevant, and do not undermine enforceability.

3. REACTIONS OF NATIONAL LAWS TO THE NEEDS OF INTERNATIONAL PLAYERS IN TERMS OF LIABILITY

National laws typically feel the need of businesses operating and trading internationally and they try to provide solutions not to chase these businesses away from applying their national laws. We may identify diverse solutions and reactions on how legislators or judicial practice respond to these challenges:

- Promoting 'big business' in general: an interesting approach is when the legislator establishes national contract law on the presumption that contract law is mainly used by big players, big businesses. In such systems (e.g. Hungary), national contract law targets to serve the needs of big volume transactions pushing contract law closer to the international arena's desires.¹⁹
- Various dimensions of contracting: a classic solution is when the rules of national contract law are systematically grouped for various transactions. In these systems (e.g. Germany) rules are different to B2B (business to business), B2C (business to consumer) and C2C (consumer to consumer) relations having stricter criteria for defenses in the B2B range.²⁰
- Protective norms in favor of the national law: it is a rare solution when the legislator composes imperative norms in national contract law, and obliges courts to honor these norms even if the parties agreed in the application of a foreign legal system (e.g. China).²¹
- Separate regimes for domestic and international transactions: some countries are willing to give up their concepts on contracts in cases of international transactions. They apply different set of rules for domestic

19 Article 6:142 of Act V of 2013 on the Civil Code (Hungary).

20 Schwenzer, Ingeborg-Whitebread, Claudio Marti: International B2B Contracts – Freedom Unchained?, *Penn State Journal of Law & International Affairs*, 4 (2015) 1, 45.

21 Jianhua, Zhong-Guanghua, Yu: China's Uniform Contract Law: Progress and Problems, *Pacific Basin Journal*, 17 (2009) 1, 27.

and international contracts. The USA is a great example to that approach. While the U.S. has never let its contract law to be manipulated by the international obligations of the country, it is very lenient in joining and ratifying international treaties and conventions that apply to international business transactions, even if these international instruments are typically closer to civil law contract doctrines and principles.²²

As different systems react to the rapidly changing international market with diverse instruments, choice of law and forum selection clauses in the actual contracts are even more important than they were a couple decades ago. Even if the parties agree on the applicable law, the forum may overwrite the choice of law clause due to some imperative norms, or they may find themselves in a legal environment that classifies their transactions differently from their intentions.

Another interesting angle of the diversity of national laws related to contractual obligations is the way states and the international community interpret the nature and the scope of the immunity doctrines in international business relations. The classic rule of '*pacta sunt servanda*' might easily be derogated by the immunity concepts in cases when state bodies or state-like entities are engaged in business relations.

4. THE IMMUNITY PRINCIPLES AS OBSTACLES IN INTERNATIONAL BUSINESS LAW

Commercial activities of states are often protected by the principle of immunity. As the doctrine developed over the years in the form of undisputed international usances,²³ states enjoy sovereignty and immunity for their activities either. A governmental (*acta jure imperii*) or commercial (*acta jure gestionis*).²⁴

22 Aguiar, Anelize Slomp: *The Law Applicable to International Trade Transactions with Brazilian Parties: A Comparative Study of the Brazilian Law, the CISG, and the American Law about Contract Formation*, Toronto, University of Toronto Press (2011) 59.

23 Byers, Michael: *Custom, Power, and the Power of Rules: International Relations and Customary International Law*, Cambridge, Cambridge University Press (1999) 4.; Shaw, Malcolm N.: *International Law*, Cambridge, Cambridge University Press (2008) 141.

24 Yee, Sienho: Foreign Sovereign Immunities, *Acta Jure Imperii* and *Acta Jure Gestionis*: A Recent Exposition from the Canadian Supreme Court, *Chinese Journal of International Law*, 2 (2003) 2, 649.

We have to, however, distinguish the two basic forms of immunity: enforcement and jurisdictional immunity. Immunity from jurisdiction refers to a limitation of the adjudicatory power of national courts,²⁵ whereas immunity from enforcement prevents courts of the forum state from imposing measures of constraint on the foreign State.²⁶

Traces of origin in early history shows that the immunity doctrine was an absolute concept, though it was granted to merchants who enjoyed the status of state dependents.²⁷ This absolutism went through the development of customary international law²⁸ and impulsed state confidence in international market, commonly by using immunity as a safe harbor for their misconduct. The absolute character of immunity, however, tended to fundamentally be unfair for private entities when they got engaged in commercial relations with state enterprises. The shield of immunity was commonly used to avoid private accountability for the state's commercial activities. Western Europe and the United States then constructed a slight restriction of the immunity doctrine,²⁹ especially in dealing with disagreement of immunity for the commercial nature of state activities.

The restrictive approach of the immunity doctrine provided that states could merely be immune from the jurisdiction related to their "public acts" (*acta jure imperii*) but were not immune from the jurisdiction of foreign forums for their "private acts" (*acta jure gestionis*).³⁰ This concept was then adopted by several national laws, i.e. Foreign Sovereign Immunity Act (the United States),³¹ The State Immunity Act

25 Lauterpacht, Hersch: The Problem of Jurisdictional Immunities of Foreign States, *British Yearbook of International Law*, 28 (1951), 220-225.

26 Wiesinger, Eva: State Immunity from Enforcement Measures, University of Vienna (2006) 1. [Available at: http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf (Accessed: April 2nd, 2017)].

27 Rollinger, Robert-Ulf, Christoph (eds.): *Commerce and Monetary Systems in the Ancient World Means of Transmission and Cultural Interaction*, Proceedings of the Fifth Annual Symposium of the Assyrian and Babylonian Intellectual Heritage Project, Innsbruck (2002) 97.

28 Brownlie, Ian: *Principles of Public International Law*, Oxford, Oxford University Press (2008) 323-327.

29 McNamara, Tom: A Primer on Foreign Sovereign Immunity, Paper presented in Union Internationale des Avocats, Winter Seminar on International Civil Litigation and the United States of America (2006) 1. [Available at: <http://www.dgslaw.com/images/materials/McNamara1.pdf> (Accessed: April 2nd, 2017)].

30 Dorsey, William R.: Reflections on the Foreign Sovereign Immunities Act after Twenty Years, *Journal of Maritime Law and Commerce*, 28 (1997) 2, 262-265.

31 Dorsey: op. cit.

(the United Kingdom),³² and was also used as a source of interpretation by judges, i.e. in the case of *Stukonis v. USA Embassy*,³³ *Philippine Embassy Bank Account*,³⁴ *Leica AG v. Central Bank of Iraq et Etat Irakien*,³⁵ and other cases in which the courts improved the appropriate test to determine the acts of the state whether these have a public or private character. Furthermore, international communities agreed upon initiatives to universalize such restrictions of the immunity doctrine through multilateral treaties such as the European Convention on State Immunity (1976)³⁶ and the United Nations Convention on Jurisdictional Immunities of States and Their Territories (2004).³⁷

The concept of restrictive immunity could not gain full universal acceptance because, obviously, some countries are still interpreting immunity as an absolute concept. In the recent case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, the High Court of Hong Kong by formal support from the Minister of Foreign Affairs of Hong Kong 'in position that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'.'³⁸ Moreover, private actors must work hard to prepare argumentation in determining the acts of state whether the debated act is of a public or private nature. This often burdens the court's infrastructure and energy. Even if the Court rules for the private actors, they are forced to struggle with the enforcement court which sometimes operates under a different legal system, and, therefore, applies different interpretations and practices. They still have to go through the enforcement process, unless there is a consent of their partner state to waive the immunity under the scope of the private agreement.

32 Bowett, D. W.: The State Immunity Act 1978, *The Cambridge Law Journal*, 37 (1978) 2, 193.

33 Toleikytė, Meringa: The Concept of State Immunity and The Main Challenges (2015) [Available at: http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf (Accessed: March 3rd, 2017)].

34 Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342; 65 ILR 146.164.

35 Leica AG v. Central Bank of Iraq et Etat Irakien, Cour d'appel, Brussels, 15 February 2000

36 European Convention on State Immunity, 16 May 1972, 1495 U.N.T.S. 181.

37 United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter 'UN Convention on Jurisdictional Immunities']

38 *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, Judgment of the High Court of the Hong Kong Special Administrative Region No. 928 of 2008. par.14. [Available at: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=%28firm%29&TP=JU (Accessed: March 3rd, 2017)].

In the 21st century, international businesses and several working groups encourage states to restrict the immunity doctrine within the scope of their national laws and practices. The main argument these entities bring up to justify the urge for limitation of a wide interpretation of the immunity doctrine is basically the dynamics of modern economic development. Under such circumstances, it is an obvious need from the investors to get legal certainty, predictability to protect their investments in a foreign country. When a state could maintain justice within the business environment, this would increase the state's image make it look like a pro-investment state, and may also boost the economic development for the nation's welfare.

The European Convention on State Immunity was the first comprehensive international multilateral treaty that addressed the problem of state immunity. It was adopted on 16 May 1972 by the Council of Europe and came into force on 11 June 1976. The Convention was clearly an attempt in international legislation on one of these perennial problems among a group of European states to establish restrictive measures on immunity. It is currently ratified by eight countries in the European Union such as Austria, Belgium, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom.³⁹ Five of these countries (Austria Belgium, Netherlands, Luxembourg and Switzerland) are also parties to the Convention's Additional protocol that established the European Tribunal in matters of State Immunity.⁴⁰ This Tribunal determines disputes under the Convention.⁴¹

In December 2004, the United Nations Convention on Jurisdictional Immunities of States and their Properties (UN Convention) was adopted by the United Nations General Assembly.⁴² Capping more than a quarter of a century of intense international negotiation, the new treaty is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts.⁴³ The main purpose of this Convention is to provide a single rule and common measures on the application and interpretation of state

39 Council of Europe: Chart of Signatures and Ratifications of Treaty European Convention on State Immunity, (2016), [Available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures> (Accessed: November 20th, 2015)]

40 The Additional Protocol to the European Convention on State Immunity, came into force on 22 May 1985.

41 Edwards, Richard W.: Extraterritorial Application of the US Iranian Assets Control Regulations, *The American Journal of International Law*, 78 (1981) 4, 870.

42 UN Convention on Jurisdictional Immunities.

43 Stewart, David P.: The UN Convention on Jurisdictional Immunities of States and Their Property, *The American Journal of International Law*, 99 (2005) 1, 194.

immunity. It also harmonizes the restrictive approach of state immunity into the domestic laws of the Contracting States. Indeed, the Convention builds on the experiences gathered under the 1972 European Convention on State Immunity as well as on state practices under various domestic statutory regimes.⁴⁴ Unfortunately, this Convention has not yet come into force because of its failure to be ratified by the minimum number of states.⁴⁵ Until now, there are only 12 state parties to this Convention, including: Austria, France, the Islamic Republic of Iran, Japan, Kazakhstan, Lebanon, Norway, Portugal, Romania, and Saudi Arabia.⁴⁶

In international law, the doctrine of immunity is a derivation from the principle of *par in parem non habet imperium* (one sovereign power cannot exercise jurisdiction over another sovereign power). As sovereign entities, states enjoy immunity, a legal protection for their representatives, assets, and activities. However, this study supports Lauterpacht's view: the doctrine of immunity is basically not part of customary international law, considering the inconsistencies of its application and related practice.⁴⁷ Prior to the mid-twentieth century, state immunity was seen in nearly absolute terms.⁴⁸ In the era of globalization, states became more engaged in commercial activities, and private entities interacting with foreign states lashed out absolute sovereign immunity as a fundamentally unfair practice that eliminates judicial recourse and one that favors state parties.

44 Dickinson, Andrew-Lindsay, Rae-Loonam, James P.-Chance, Clifford: State Immunity: Selected Materials and Commentary, Oxford, Oxford University Press (2004).

45 UN Convention on Jurisdictional Immunities, Article 30 paragraph (1) and (2) states: (1) The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. (2) For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

46 Committee of Legal Advisers on Public International Law (CAHDI). (2011) State of Signatures and Ratifications of the UN Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity. [Available at: http://www.coe.int/en/web/cahdi/meeting-documents?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_type=content&_101_assetEntryId=2066048] (Accessed: November 28th, 2015)].

47 Lauterpacht: op. cit. 227-228.

48 Henderson, Conway W.: *Understanding International Law*, Oxford, John Wiley & Sons (2010) 140

During the historical development, the approach on state immunity changed to a restrictive immunity concept. This approach is based on the two different acts of the state. According to the restrictive immunity doctrine, private acts of the state (*acta jure gestionis*) are no longer immune. Only public acts of the state (*acta jure imperii*) enjoy privilege to be immune from foreign jurisdictions. Belgian courts were among the very firsts to adopt the private acts as exceptions under the general principle in early 1857.⁴⁹ In modern era, restrictive immunity has been adopted by the common law countries through their domestic legislations, however, some states still apply the absolute approach of immunity.

Considering that the restrictive approach of immunity doctrine has no universal application, this study found that choice of law provisions may be effective solutions to the immunity bridge problem. To avoid unfair treatment, parties in international commercial agreements are obliged to choose the law that promotes their favorable and fair business relationships. The chosen governing law will determine the validity and enforceability of the contract. This study recommends that the Law of New York and the English Law could offer suitable governing laws for contractual agreements involving state parties. The two laws are worthy governing law because of the modern and sophisticated systems they created, guaranteeing predictability, providing certainty, and because both systems apply and support the restrictive immunity theory.

The modern and sophisticated laws of England and the State of New York are core foundation of the common law systems. These systems rely on two primary sources of law: codified law (including constitutional law, statutory law, and regulatory law) and case law (precedents). Even if the codified law is unclear Courts enjoy an utmost freedom for interpretation. Court decisions are of legal significance: they serve bases for future decisions of the courts if the cases before them arise from the same material facts. These systems are universally known as the ones built on the doctrine of precedents forming the cornerstones of common law systems.⁵⁰

In fact, the precedent system contributes majorly in modernizing the law. Both statutory law and case law are completing each other. They are more adaptable and responsive to complex and even complicated legal disputes than civil law systems. In certain areas, English and New York Law may show differences, for instance in the

49 Alabeek, Rosanne Van: *The Immunity of States and Their Officials in International Criminal and International Human Rights Law*, Oxford, Oxford University Press (2008) 14.

50 Harris, Bruce: Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle, *Law Quarterly Review*, 118 (2002) 412-413.

adoption of the good faith doctrine. New York Law confirms that ‘every contract imposes obligation of good faith in its performance’,⁵¹ while in contrast, English Law clearly deny the adoption of the good faith principle in its contract law.⁵² With strong emphasis on precedents, such differences motivate the court to establish certain measures and legal reasoning⁵³ rather than adverse legal constraints.

Consistency of binding precedents in the common law legal systems provides predictability. For experienced parties, the laws that assure predictability fit their basic needs. During the negotiation stage, parties can predict that the existing codified rules and case law sufficiently provide guidance for their future performance. Moreover, the contract would be more efficient if the chosen governing law paired with the forum selection clause point to the same jurisdiction and legal system. Choosing the English Law as governing law and the courts of England and Wales as intended dispute settlement forums in the agreement will prevent parties from the problem of competition between the *lex fori* on the enforceability and interpretation of the forum selection clause in the chosen law.⁵⁴

As we previously discussed, both English law and New York law grant immunity to the states but not in commercial activities. These restrictive immunity concepts are also recognized as binding precedents. The US FSIA legislates that the immunity of a foreign state is not extended to suits based on its commercial acts.⁵⁵ The United Kingdom’s State Immunity Act provides general regulation of immunity and lists certain exceptions of immunity to promote the doctrine of restrictive immunity.⁵⁶

Practicing lawyers recommend that it is important to waive the immunity clause in a contract. This clause indicates a consent of the state unconditionally and irrevocably that it would not invoke immunity as a sovereign entity. However, not all parties in

51 Article 1-203 of the Uniform Commercial Code.

52 Cartwright, John: *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*, Oxford, Hart Publishing (2007) 60.

53 English law has characteristically committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. See *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd.* (1989) 1 Q.B. 433. *First Energy (UK) Ltd. v. Hungarian International Bank Ltd.* (1993) 2 Lloyd’s Rep 194. *Scottish Power Plc. v. Kvaerner Construction (Regions) Ltd.* (1999) SLT 721.

54 Clermont, Kevin M.: *Governing Law on Forum-Selection Agreements*, *Hastings Law Journal*, 66 (2015) 3, 652.

55 Article 1602 of The United States Foreign Sovereign Immunities Act, 15 ILM 1388 (1976) (hereinafter: US FSIA)

56 Article 3 of The State Immunity Act, 17 ILM 1123 (1978)

international commercial transactions are aware of this clause and option. In this matter, private parties must build strong arguments against the state parties that claim for immunity in their commercial activities. Using the immunity defense, state parties are sometimes reluctant to abide by their agreements to arbitrate the dispute.⁵⁷

Waiver of the immunity could be implicit as in a form of an arbitration clause or agreement. This means that submission to arbitration is, in fact, implied consent to waive state immunity. It depends, however, that under certain circumstances that waiver of immunity is not explicit and sufficient enough.⁵⁸ Choice of law clause also plays an important role to restrict immunity. Choosing the law of the country that interprets immunity restrictively is also considered a waiver of immunity by implication.⁵⁹ This legal concept has been recognized as a common rule under the common law systems, for example under section 1605 (a) (1) of the US FSIA stating that ‘a party’s agreement to arbitrate in the United States is considered consent to enforcement of that agreement and, therefore, a waiver of immunity in enforcement actions.’⁶⁰ Moreover, section 456 of the US Restatement stated that: “under the law of the United States, an agreement to arbitrate is a waiver of immunity from jurisdiction in: an action or other proceeding to compel arbitration pursuant to the agreement and an action to enforce an arbitral award rendered pursuant to the agreement.”⁶¹

57 Domke, Martin: The Enforcement of Maritime Arbitration Agreements With Foreign Governments, *Journal of Maritime Law and Commerce*, 2 (1971) 3, 618.

58 Svenska Petroleum Exploration AB (Sweden) v. Government of the Republic of Lithuania & AB Geonafta (Lithuania). EWCA Civ 1529 (2006).

59 The FSIA legislative history outlined that “with respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of particular country should govern a contract.” Born: *International Civil Litigation in US Courts: Commentary and Materials*, The Netherlands, Kluwer Law international (1996) 227.

60 Article 1605 (a) (1) of US FSIA

61 Article 456 (2) (b) of Restatement (Third) Foreign Relations Law of the United States (1987).

CONCLUSIONS

Liability is an evergreen topic in international business law for businesses, legislators and courts. New trends in the 21st century certainly moved toward a risk allocation concept not emphasizing the liability part in case of contractual breach situations. As international norms lack universality and comprehensiveness to cover most transactions in the international market, business actors lean toward national laws or concepts that support their business interests the most. Other than the obvious choice of law and forum selection clauses, a new trend emerges in the world of international business law: existing contract law theories and treaties, conventions designed to regulate a different situation became popular as parties incorporate the terms of these 'model laws' into their agreements. A motivator in this trend is the certainty of such rules and the vast case law basis to interpret and support them. Also, contracting parties tend to merge civil law and contract law elements to create a world that leaves no gaps to fill for national laws, even if they picked a governing law for their future debates. While this hybrid solution seems to work in the B2B sector, the immunity principles are still present and cause nuisances to businesses that are willing to invest in a foreign country. Even the restrictive approach is burdened in some aspects as enforcement of awards against state entities and even against state owned companies lack universal standards, and most frequently, it is up to the current political and diplomatic atmosphere between the states.